BEFORE THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 485

GUY WHITEFORD, *Petitioner,*

v.

THE HECHT COMPANY, a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF, AND MOTION AS TO THE RECORD.

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To the Honorable, the Chief Justice and the Associate Justices:

The petition of Guy Whiteford respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The motions of the respondent in the trial court for peremptory instructions and judgment non obstante veredicto.

The petitioner filed his complaint (R. 1), subsequently amended (R. 8), in the District Court of the United States for the District of Columbia against the respondent, by

which he sought the recovery of a real estate broker's commission claimed to be due him for services rendered the respondent in connection with the lease of respondent's warehouse to the United States of America.

During the proceedings in the District Court, the respondent made motions for a directed verdict at the close of petitioner's evidence and again at the close of all the evidence. The same matter again was presented to the trial court on motion for judgment notwithstanding the verdict. All three motions were made on the ground of insufficient evidence with regard to the issue of procuring cause. Each, after extensive argument, was denied. In its memorandum opinion denying respondent's motion for judgment notwithstanding the verdict (R. 183) the trial court stated as follows:

> "The third ground is that there was not sufficient evidence for submission to the jury on the issue of whether plaintiff was the procuring cause of the lease. In considering this point the Court must construe the evidence most favorably to the plaintiff and give the plaintiff the full effect of every legitimate inference therefrom. If then, upon the evidence so considered, reasonable men might differ, the motion should not be granted. On the other hand, if no reasonable man could reach a verdict in favor of the plaintiff, the motion should be granted.
>
> "The record in this case is lengthy. *Counsel gave the Court the benefit of a full review of the evidence adduced at the close of the plaintiff's case on the motion then made for a directed verdict; fully reviewed the evidence adduced at the close of all the evidence on the motion for a directed verdict made at that time, and again fully reviewed the evidence on the oral argument on the motion here under consideration. Since the submission of this motion the Court has reviewed the evidence from the transcript of the record.* It involves the activities and conduct of witnesses covering a period of over one year and three months. For the Court to review the evidence in this memorandum would further

encumber the record and serve no useful purpose. Suffice it to say that *after having had the benefit of three arguments of counsel, written briefs and a personal review of the testimony, it is my opinion that reasonable men might differ on whether the plaintiff's efforts were the procuring cause of the entry into the lease agreement between the defendant and the United States upon a consideration of the evidence in this case most favorably to the plaintiff with the benefit of every legitimate inference therefrom.*

"The motion of the defendant to enter judgment in its favor notwithstanding the verdict for the plaintiff is therefore denied." (Italics supplied)

2. The evidence pertaining to the issue of procuring cause.

The evidence pertaining to the issue of "procuring cause" which the trial court found to warrant submission to the jury, and from which the jury found that the petitioner was the procuring cause of the lease agreement between the United States and the respondent, shows the following:

On February 10, 1936, the respondent, by its manager, George M. Quirk, requested the petitioner in writing "to prepare plans for the disposing of the G Street warehouse, which we will vacate October 1" (R. 10). The petitioner acknowledged receipt of respondent's letter two days later (R. 11), and between February 15 and 17, 1936, went to the office of Quirk to see what respondent "had in mind" (R. 11). In the course of the ensuing conversation, in which Quirk stated that respondent wished to sell the property, petitioner advised that he thought respondent's "best bet is to lease this building", and that "the building should be leased to the United States Government" (R. 13, 14). Quirk answered petitioner's suggestion by saying that he "had not thought of that", and that he preferred a private tenant (R. 13). However, permission was given to petitioner to submit the property for lease to the Federal Gov-

ernment (R. 14), although Quirk testified that, to the best of his recollection, he did not authorize petitioner to do so at this particular time, that is, in the course of this initial conversation between February 15 and 17, 1936 (R. 89).

Immediately after the above conference between Quirk and the petitioner, the latter went to the Office of Space Control, to see Clay J. Guthridge, Chief of Space Control, and submitted respondent's property (R. 14, 15). Of this submission to the Federal Government, petitioner claims respondent was immediately notified by telephone upon petitioner's return to his own office, which telephonic notification, however, "to the best of his recollection", is denied by Quirk (R. 90). Guthridge, on the other hand, admitted that the petitioner had been in his office for the purpose of submitting respondent's property to the Federal Government for lease, without, however, being able to fix the exact date of petitioner's visit (R. 131). This witness further stated that he could not deny that the petitioner discussed with him the matter of availability of respondent's property for occupancy by *any* government agency (R. 194).

In addition to having gone to the Office of Space Control to discuss the property with Guthridge, petitioner took an employee of Space Control, Ralph McAllister, to respondent's property in the early spring of 1936 (R. 71), around the middle of April, 1936 (R. 55), of which inspection Quirk was notified by the petitioner (R. 188). McAllister, in turn, testified that the property had never been offered to Space Control prior to the time of his inspection together with the petitioner around the middle of April, 1936 (R. 77). Regarding this inspection of the property, Guthridge testified that McAllister discussed the property with him (R. 132); that the property was discussed "when Mr. McAllister was making his inspection of buildings, because he came in and said, "I was shown these various buildings,'" and that "the G Street building was one of them that he, McAllister, reported on " (R. 135).

McAllister testified that it was his "usual procedure" to report each day either to Guthridge or to his assistant, Melvin C. Russell, on his daily activities and that the fact of his inspection of the property together with the petitioner was "in all probability" reported (R. 76).

In September, 1936, the petitioner, upon permission from the respondent (R. 21), accepted the assistance of Carl G. Rosinski, another real estate broker, specializing in the leasing of business properties (R. 79), for the immediate purpose of working on a prospect concerning the lease of the property to the Social Security Board (R. 79). A discussion, which the respondent had with the petitioner and Rosinski at the end of September, 1936, resulted in Quirk's statement that he wanted more rent than the Federal Government was legally permitted to pay—that is, a rental greater than 15% of the assessed value of the property, which would have amounted to a little over $38,000.00 per annum. Quirk suggested on this occasion that petitioner and Rosinski attempt to have the Office of the Assessor of the District of Columbia raise the assessed value of the property so as to create the formal basis for a higher rental which the Government could legally pay. Both brokers refused to do that (R. 25, 80, 81).

Under date of November 18, 1939, Rosinski approached the respondent again by letter asking whether respondent was now ready "to deal as previously suggested", that is, on the basis of 15% of the then assessed value of the property (R. 26, 27). Respondent answered that it "would not be interested in leasing * * * in accordance with * * * previous suggestions" (R. 27), and Quirk, on cross-examination, admitted that the purport of this answer was an unqualified refusal to entertain any rental proposition from the Government "under any conditions" (R. 191, 192).

However, after the respondent had thus repeatedly and categorically refused to consider the Federal Government as a tenant at a cash rental which the Government, under

the law, was permitted to pay, it entered into direct negotiations with the Federal Government. Quirk testified that the cause for respondent's change of mind with regard to a tenancy of the Federal Government was the fact that respondent was ready to vacate the property; that it had to do something with the building, and *"it was the best we could do with it"* (R. 97, 98).

Guthridge, although he had stated on direct examination that according to his recollection neither the petitioner nor Rosinski were the cause of his getting in touch with Quirk (R. 128), admitted, unequivocally, on cross-examination, *first*, that McAllister did discuss the building with him (R. 193); *second*, that among the sources of his information that respondent's property was available, was the discussion he had with McAllister (R. 136), which discussion, according to "the usual procedure" of reporting each day (R. 76), *must have taken place around the middle of April, 1936, that is to say, prior to any listings or propositions by other real estate brokers interested in the same property;* and, *third*, referring to later written submissions of the same property by other brokers, that he remembered the availability of the building without the necessity of "thumbing over the file", containing such other later written listings (R. 132, 133). As far as the evidence shows that the property was also submitted to Space Control by other brokers, it is established that the earliest submission after that of Whiteford was that of Henry K. Jawish, dated July 16, 1936 (R. 150). Another submission by Frank J. Mulkern had taken place on October 6, 1936 (R. 130).

Jawish listed the property with Melvin C. Russell, Chief of the District of Columbia Space Control Section. Regarding the date of that listing, July 16, 1936, Russell could not recall how many days prior thereto Jawish had called on him personally in reference to the property (R. 195), but stated that he himself became associated with Space Control only in April or May, 1936 (R. 149, 194), that is, *after the date the petitioner had submitted the property to Guth-*

ridge and shown it to McAllister, so that Russell's further statement to the effect that the property was called to *his* attention *solely* by Jawish (R. 152), does not denote any priority or exclusiveness of listing on the part of Jawish, but rather the non-presence of this witness at a time when the petitioner was acting in the same matter by contacting other employees of Space Control. Neither Jawish nor Mulkern claimed a commission.

The evidence further shows that Quirk, at a time when he was in direct negotiations with the Federal Government, that is, after January 20, 1937, not only did leave unanswered letters of the petitioner, dated March 26 and May 12, 1937, respectively (R. 34), in which letters petitioner continued his efforts to obtain the consent of Quirk to accept the Federal Government as a tenant for a yearly cash rental as authorized by law (R. 30), but, in addition, requested the petitioner to change the text of his sign on the property so as to offer separate floors for rent (R. 31, 39, 190), and, knowingly, let the petitioner go to the additional expense of circularizing real estate brokers by printed notices of such changed offer (R. 190), *although at the very same time respondent felt bound by its oral agreement of March 22, 1937, to lease to the Federal Government* (R. 103, 192).

The petitioner testified (R. 69, 70)—which testimony was fully confirmed by the testimony of Mrs. Helen R. Sams, petitioner's secretary at that time (R. 195, 196)—that the respondent informed him over the telephone on June 1, 1937, that the property had been rented and that the petitioner could take down his sign. On this occasion petitioner testified that Quirk made the following statement:

> "Well," I said, "Mr. Quirk, why did you take the deal now from the Government when we have been hounding on you all this time and trying to get you to take the deal that we offered you?"
>
> "Well, he said, "*you finally convinced me that it was the best thing to do*". He said, "*You hounded on me*

> *so long and you used so many arguments as to why we should do it that," he said, "I thought it was the best thing for us to do."* (Italics supplied) (R. 70).

This telephone conversation of June 1, 1937, Quirk did not recall, nor did he deny it (R. 193), although he stated also that the petitioner called him "sometime around June 1st"; that he did not know "whether it was exactly June 1st or not" (R. 191). Quirk denied, however, of having ever told petitioner that because of the latter's persuasion he had finally accepted the Federal Government as a tenant (R. 98). On the other hand, Quirk claims that he informed the petitioner on March 22, 1937, that the property was rented to the Government Printing Office (R. 99), fixing that date in his mind, because it happens to be the anniversary of the burial—*not the death*—of his brother (R. 193). Upon cross-examination on this point, it developed that the event which enabled Quirk to fix said date of March 22 occurred thirty-eight years ago (R. 193).

Upon request of the petitioner, which was granted by the trial court, the jury was instructed to apply to the above stated evidence the following rule with respect to the issue of procuring cause:

> "You are instructed to find Mr. Whiteford the procuring cause for the lease between The Hecht Co. and the United States, if you find as a fact that by his acts and services in conformity with his contract of employment, Mr. Whiteford originated or set in motion, without break in their continuity, direct negotiations between The Hecht Co. and the United States Government which resulted in, or produced, the entry into the lease agreement between The Hecht Co. as owner and the United States as tenant." (R. 172).

The jury rendered its verdict in favor of the petitioner (R. 180), and the respondent filed its motion for judgment notwithstanding the verdict, or, in the alternative, to set aside the verdict and for a new trial (R. 181). The motions

were denied (R. 182-184), and the respondent filed its Notice of Appeal (R. 185).

3. The reversal by two justices of the Court of Appeals, forming the majority, on the ground of insufficiency of evidence to find petitioner the procuring cause.

On appeal before the United States Court of Appeals for the District of Columbia, the respondent presented to the appellate court the following five questions for decision (R. 204):

> "1. Whether there was sufficient evidence to warrant a submission to the jury of the issue of whether the plaintiff was the procuring cause of the lease, so as to entitle him to a commission.
>
> "2. Whether it is consistent with public policy to allow a broker a commission contingent upon his obtaining the entering into of a lease to the Government of the United States.
>
> "3. Whether the statute of limitations is pleadable to an amended declaration which changes the plaintiff's claim from reliance on an express, to reliance on an implied contract.
>
> "4. Whether it is error for the trial court to refuse to read instructions to the jury which have been granted by the court and which have been read to the jury by counsel in the course of his closing argument.
>
> "5. Whether the trial court erred in excluding certain proffered testimony."

With regard to these five questions the dissenting justice correctly stated as follows:

> "The majority opinion answers question number one in the negative; discusses, without deciding, question number two; ignores questions three, four and five; and discusses a collateral question that was not raised by the appellant either in the trial court or on this appeal regarding the sufficiency of the evidence to

support the amount of the commission found by the jury" (R. 205).

The judgment of the District Court, based on the verdict of the jury, was reversed by the majority of the appellate court "on the ground that the evidence is not sufficient for the jury to find that appellee, Whiteford, was the procuring cause of the lease" (R. 204). With regard to petitioner's visit to the Office of Space Control in February, 1936, and the inspection of the property by McAllister and the petitioner in April, 1936, the majority concluded that "there was no evidence that either of these episodes had anything to do with bringing about the lease that was ultimately signed" (R. 203). Final reliance, however, is placed by the majority upon "what they say is the positive testimony of the Space Control staff that Whiteford had no part in the chain of causation which resulted in the lease to the Government Printing Office" (R. 203, 206). The dissenting justice, referring to this "final reliance" of the majority upon the allegedly "positive" testimony of the staff of Space Control—as compared with the evidence submitted by the petitioner in order to show that it definitely permitted an inference of the petitioner having originated or set in motion, without break in their continuity, direct negotiations between the respondent and the United States Government which resulted in, or produced, the entry into the lease agreement, and that such inference was not mere speculation but was within the realm of reasonably deducible fact—commented as follows:

> *"Quite evidently, therefore, the Space Control staff did not 'positively testify' that Whiteford had no part in the 'chain of causation' as assumed by the majority."* (R. 207). (Italics supplied)

In respect to the accuracy of the evidence stated by the petitioner the dissenting justice commented:

"I have carefully checked the summarized facts against the record which, I am convinced, amply supports them" (R. 207).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A writ of certiorari should be granted under subdivision 5 (b) of Rule 38 of this Honorable Court for the following reasons:

1. The two justices of the United States Court of Appeals for the District of Columbia, forming the majority in the present case, in overruling the verdict of the jury, set themselves up as the triers of the facts superior to the jury of twelve men who heard the evidence and saw the witnesses, *thereby depriving the petitioner of the right of trial by jury on an issue of fact in violation of the Seventh Amendment of the Constitution of the United States.*

2. The decision of the two justices of the United States Court of Appeals for the District of Columbia, forming the majority in the present case, is in conflict with decisions of this Honorable Court and of their own appellate court to the effect that a motion for judgment notwithstanding the verdict, or to set aside the verdict, should be granted only *when but one reasonable view can be taken of the evidence and its every intendment, and that view is utterly opposed to the plaintiff's right to recover.*

3. The decision of the two justices of the United States Court of Appeals, forming the majority in the present case, is in conflict with decisions of this Honorable Court and of their own appellate court which hold that on a motion for peremptory instruction, or for judgment *non obstante veredicto*, the evidence must be construed most favorably to the party opposing such motion.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, to the end that the decision of the United States Court of Appeals for the District of Columbia, rendered in the case numbered and entitled on its Docket No. 8246, The Hecht Company, a corporation, *Appellant,* v. Guy Whiteford, *Appellee,* be reviewed and determined by this Honorable Court; and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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